Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

HAROLD MARSHALL,

Petitioner,

versus

DELTA FAMILY-CARE DISABILITY AND SURVIVORSHIP PLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. THE LOWER COURT INCORRECTLY APPLIED THE STANDARD OF REVIEW OF ABUSE OF DISCRETION INSTEAD OF *DE NOVO* REVIEW, DUE TO THE PLAN ADMINISTRATOR'S BREACH OF ITS FIDUCIARY DUTY.

II. THE LOWER COURT INCORRECTLY APPLIED THE ABUSE OF DISCRETION STANDARD IN DETERMINING THAT THE PETITIONER WAS NOT ENTITLED TO LONG TERM DISABILITY BENEFITS.

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The decision of the United States Court of Appeals for the Eighth Circuit, dated July 31, 2001, is set forth in Appendix Exhibit 1. The Opinion of the United States District Court for the Eastern District of Arkansas, dated October 24, 2000, is set forth in Appendix Exhibit 2.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Eighth Circuit issued its Decision in this case on July 31, 2001. This Petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Statutory Issues:

1. *Employer Retirement Income Security Act of 1974* (ERISA) 29 U.S.C. Section 1001 et seq.

STATEMENT OF THE CASE

The Petitioner in this matter brought an action pursuant to the Employer Retirement Income Security Act of 1974 seeking long term disability benefits from the Respondent. The Plan provided that an employee shall be eligible for long term disability benefits provided he is disabled as a result of demonstrable injury or disease which will continuously and totally prevent him from engaging in any occupation whatsoever for compensation or profit, including part-time work.

On September 6, 2000, the United States District Court of the Eastern District of Arkansas issued a Memorandum Opinion and Order finding that the Petitioner was entitled to long term disability benefits. In particular, the Court found that the Respondent had abused their discretion in denying benefits. On October 6, 2000, a Notice of Appeal was filed by the Respondent, Delta Family Care, from the District Court's decision. On July 31, 2001, the Eighth Circuit Court of Appeals issued an Opinion finding that the Respondent's decision to terminate the Petitioner's long term disability benefits was reasonable vacating the judgment of the District Court and directing that judgment be entered in favor of the Plan.

STATEMENT OF THE FACTS

The Petitioner in this matter is a long term employee of Delta Airlines, who first sustained an injury some 20 years ago when an airplane part fell on him at work resulting in low back surgery at L4-5 and L5-S1 levels in 1980. Afterward, the Petitioner recovered and returned to work until the second back injury occurred in 1989, which led to further surgery and instrumentation at the same level. In turn, the Petitioner was receiving workers' compensation benefits including permanent disability from Delta's insurance carrier with regard to both injuries. At the same time, Petitioner applied for and was receiving short term disability benefits under the Plan through March 4, 1992. Upon Petitioner's application, the Plan began paying long term disability benefits on March 18, 1992. These benefits were terminated some six years later on April 1, 1998. It was at this time that Delta Airlines and its workers' compensation carrier, Wausau Insurance Company, began taking action on the workers' compensation claim. In particular, the workers' compensation carrier had the Petitioner evaluated by Dr. Tad Pruitt, Dr. Anthony Russell and by Gaye Signoff of Cascade Rehabilitation. This information was turned over by the workers' compensation

carrier to the Respondent for review. In addition, the Respondent used a report of the attorney representing Wausau and Delta Airlines in a workers' compensation claim as part of the justification for denying benefits.

In addition to this, the Petitioner was evaluated by Dr. Jim J. Moore and Pinnacle Rehabilitation. In addition, the Petitioner was being followed by his treating physicians, Dr. Harold Chakales and Dr. Diner. All of these physicians indicated that clearly the Petitioner was totally disabled and not able to perform gainful employment.

Subsequent to this, all administrative remedies for the Petitioner were exhausted and suit was filed.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT INCORRECTLY APPLIED THE STANDARD OF REVIEW OF ABUSE OF DISCRETION INSTEAD OF *DE NOVO* REVIEW, DUE TO THE PLAN ADMINISTRATOR'S BREACH OF ITS FIDUCIARY DUTY.

The Lower Court in this matter used the abuse of discretion standard where the Plan give the Administrator discretion to determine eligibility for benefits and to construe the terms of the Plan. See: *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101, 115 (1989). The Lower Court refused to use the *de novo* standard of review despite all of the evidence that the Plan had a very serious procedural irregularities in their consideration and use of information obtained in connection with the Petitioner's workers' compensation proceeding.

It is well settled that in certain instances, a committee or plan determination that would otherwise receive differential review (abuse of discretion) is held to a more searching or heightened review. Such is the case where the Petitioner demonstrates that: (1) a palpable conflict of interest or a serious procedural irregularity existed; which (2) caused a serious breach of the plan's Administrator fiduciary duty to the insured. See: *Woo v. Deluxe Corp.*, 114 F.3d 1157 (8th Cir. 1998) citing *Buttram v. Central States, S.E. & S.W. Areas Health & Welfare Fund*, 76 F.3d 896 (8th Cir. 1996). In fact, it is clear that under certain circumstances the reviewing Court may be required to give essentially no deference to a committee's or plan's determination. See: *Armstrong v. AETNA Life Insurance Company*, 128 F.3d 1263 (8th Cir. 1997).

It is evident from the administrative record that the Respondent, through the Administrative Committee, was acting in concert with and receiving information from Delta's workers' compensation carrier towards a common goal of eliminating further benefits to the Petitioner.

It should be noted that up until 1998, both AETNA, as the workers' compensation carrier, and Delta (Respondent) continued to both pay benefits in this matter. Also, the Respondent was receiving Social Security disability benefits as requested by the Respondent.

The Petitioner was being followed by Dr. Harold Chakales from an orthopedic standpoint, and Dr. Remmel and Dr. Good from a psychological standpoint. All three physicians indicated that the Petitioner was totally disabled. In fact, Dr. Chakales issued a report on April 13, 1998 stating that from a clinical standpoint, the Petitioner suffered from post-lumbar laminectomy syndrome with chronic arachnoiditis with chronic nerve root irritation. In his opinion, the Petitioner could not work.

Next, either the Plan or the compensation carrier had the Petitioner evaluated by Dr. Pruitt. It is clear they were working in concert to try to limit their exposure for both workers' compensation and long term disability. For example, one of the things found in the administrative file of the Respondent was the adjuster notes from Wausau Insurance Company. In particular, there was an August 28, 1998 note from the adjuster which stated as follows:

> "Unless we can get a psychiatrist to say that Mr. Marshall is just "B.S.'ing" Dr. Remmel and is mentally fit to work and is not clinically depressed to the point that he is p&t (permanent and total) from a traumatic neurosis standpoint, I bet we will lose the case on that issue."

Also, Wausau Insurance Company, not the Plan, hired an investigator and was sharing the information with the long term disability carrier.

In addition, the Plan used what they term deposition testimony from the Petitioner concerning his abilities to work. It should be noted that no deposition was part of the administrative record. Again, the Plan was relying upon a deposition report made to Wausau Insurance Company by their attorney, not to the Plan, as part of its determination factor.

Of course, the part of the workers' compensation file that the Plan did not use concerned the acceptance by Wausau and the State Workers' Compensation Commission that the Petitioner was permanently and totally disabled.

In summary, it is clear that the IME cited by the Respondent was set up by the workers' compensation carrier. They also noted the surveillance they were relying upon was

set up by the workers' compensation carrier. They also relied upon Gaye Signoff's report of Cascade Rehabilitation to make their determination. In fact, the opinions of all these persons were obtained by counsel for Wausau Insurance Company and then submitted not only to Wausau (as part of their plan to deny benefits to the Petitioner) but also to the Plan. Obviously, the Plan had the same goal as the workers' compensation carrier and that was to deny benefits to the Petitioner. With that type of goal, clearly it is evident that there was a palatable conflict of interest or, at the very least, a serious procedural irregularity that existed. Also, this caused a serious breach of the Plan Administrator's fiduciary duty to the insured. Instead, the lower court in this matter has basically said that it is not an abuse of the Plan's fiduciary duties to act in concert with other insurance companies in trying to deny benefits.

As a result, it is clear that the less deferential standard of a *de novo* review should have been used in this matter.

II. THE LOWER COURT INCORRECTLY APPLIED THE ABUSE OF DISCRETION STANDARD IN DETERMINING THAT THE PETITIONER WAS NOT ENTITLED TO LONG TERM DISABILITY BENEFITS.

The lower court has stated in its opinion that the unreasonableness of a Plan Administrator's decision can be determined by both the quantity and quality of the evidence supporting it. See: *Donaho v. F.M.C. Corp.*, 74 F.3d. 894 (8th Cir. 1996). The lower court felt there was a quantity of evidence in this record to support the Respondent's refusal to allow benefits. The lower court went on to find that with the record before it, the Plan Administrator did not abuse the discretion in finding the Petitioner not to be disabled.

In reviewing the *Donaho* decision, it is clear that the Plan's decision should be affirmed if a reasonable person could have reached a similar decision. Indeed, that is in the lower court's decision. However, it is evident from a review of this Plan that both the quantity and quality of the evidence is with the Petitioner and not the Respondent.

It should be noted that the Petitioner has undergone no less than three substantial surgeries involving his lower back since 1980, including the implantation and subsequent removal of a failed instrumentation and hardware. For much of this time, the Petitioner was followed by Dr. Harold Chakales, an orthopedic surgeon. Dr. Chakales has followed the Petitioner since 1991. Throughout the course of his treatment, Dr. Chakales maintained the Petitioner's off work status. In fact, the Respondent continue to inquire of Dr. Chakales as to whether or not the Petitioner remained disabled.

On July 17, 1993, the Petitioner underwent an independent medical evaluation with Dr. Earl Peeples, sponsored by Delta Airlines workers' compensation carrier, Wausau Insurance Company. Dr. Peeples noted that the Petitioner remained on significant amounts of medication, including Tylenol No. 4, muscle relaxers, sleeping pills, and Tenoretic. Although Dr. Peeples felt that rehabilitation might be possible, he did not remove the Petitioner from disability status and his long term disability was not terminated by the Respondent at that point. In fact, Delta sent out a memorandum indicating that there was no light work available.

Next, Dr. Winston Wilson performed a psychological evaluation on September 7, 1993. Again, no work was offered to the Petitioner and his benefits were not terminated. The Petitioner was then referred to a psychiatrist, Dr. Henry Good, in August of 1993. Dr. Good opined that the Petitioner was depressed due to chronic pain syndrome and

prescribed Zoloft. Both Dr. Good and Dr. Chakales opined throughout this period of time that the Petitioner was totally disabled. Further, another neurosurgeon, Dr. Robert Abraham conducted an independent medical evaluation on March 17, 1994 and also indicated that the Petitioner was unable to be gainfully employed at any level.

Dr. Raymond Remmel took over the Petitioner's psychiatric care from Dr. Good. In his report of November 7, 1994, Dr. Remmel opined that the Petitioner was a on a very large amount of pain medication (including Tylenol No. 4, Zoloft and Soma), and unable to work due to his chronic pain, traumatic injury and unremitting depression. Dr. Remmel actually felt that the Petitioner was permanently disabled.

In 1996, the Respondent had an independent psychological review by Dr. Steven Buchanan, who opined on May 28, that the Petitioner was totally disabled at that time. He felt that the Petitioner would be unable to work, but it was possible that he might be able to work at home, if he could set his own hours. Dr. Buchanan did note that some of the inability to work was due to impaired concentration associated with all of the medicines that the Petitioner was taking.

Also, in 1996, Delta, through their workers' compensation carrier, arranged for the Petitioner to be examined by Dr. William F. Blankenship, who concluded that the Petitioner might be able to do some restricted light duty in the form of part-time work. Despite this evidence, the Respondent did not terminate the benefits.

Throughout 1997, the Petitioner remained under the care of Dr. Chakales and Dr. Remmel. Neither doctor indicated that he would be able to return to work. Finally, the Respondent Plan sponsored a psychological examination by

Dr. Bradley Diner. Dr. Diner expressed an opinion that the Petitioner might be able to return to work. However, a review of Dr. Diner's reports indicate that he expressed a concern about the Petitioner's overuse of pain medication. In fact, he indicated that the Petitioner was on highly addictive medication causing depression and dependency. He went on to state that the Petitioner was caught in a trap of pain and medications and needed formal pain management. He went on to list that the Petitioner was taking eight to ten tablets per day of Tylenol No. 4, six tables per day of Soma, Restoril for sleep, Phenergan, Serzon for depression and Ambian. In fact, he felt that the Petitioner should be put into the Little Rock Pain Clinic. Despite accepting this comment that he might be able to return to work made by Dr. Diner, the Plan did not accept the rest of Dr. Diner's recommendations that he needed to undergo this treatment before he could attempt to return to work. Clearly, a reasonable person would accept as reasonable all of Dr. Diner's recommendations, not cherry-picking parts of reports as was done by the Plan and allowed by the lower court.

In fact, the opinion of Dr. Raymond Remmel, the treating psychiatrist for the Petitioner, and the doctor who had followed him for four years, stated that the Petitioner was still suffering from major depression. He also felt that the Petitioner had chronic pain disorder. He went on to state as follows:

> "No doubt in my mind that Mr. Marshall is permanently and totally disabled, secondary to psychiatric illness alone. I cannot and will not release Mr. Marshall to return to work at this time."

Clearly, a reasonable person would deem the reports to indicate that the Petitioner was totally disabled from a psychiatrist standpoint, notwithstanding the severe back

problems.

In fact, the orthopedic surgeon who had been treating the Petitioner for the last six years indicated that from a clinical standpoint, the Petitioner was still totally disabled due to his post-lumbar laminectomy syndrome and chronic nerve root irritation.

Next, the lower court relied upon the report of Dr. Tad Pruitt, an orthopedic surgeon, who performed independent medical evaluation number 5. Indeed, Dr. Pruitt indicated that, at best, the Petitioner could try to work at home. He went on to state that the physical condition did not take into account his mental illness and depression which might complicate or restrain him further. Clearly, none of the psychiatric reports of Dr. Diner, Dr. Remmel or Dr. Good indicated that the Petitioner was able to return to work. It is obvious that at that point the Plan or the compensation carrier (depending on which was ordering the next independent medical evaluation) had the Petitioner evaluated by Dr. Anthony Russell (independent medical evaluation number 6). In that report, Dr. Russell suggested, on August 19, 1998, that the Petitioner could perform some type of work since his degree of disability fell short of a quadriplegic actor like Christopher Reeve. Apparently, the lower court did not have a problem with the Plan using that as their test of reasonableness. Clearly, a reasonable person would not use that type of test to determine availability for work and entitlement to long term disability benefits.

A review of the doctors involved in this case are as follows:

Physician	Disability Status	Date of Last Examination
Dr. Harold Chakales, treating orthopedic surgeon	totally disabled	1998
Dr. Raymond Remmel, treating psychiatrist	totally disabled	1998
Dr. Henry Good, treating psychiatrist	totally disabled	1994
Dr. Steven Buchanan, psychiatrist, IME ordered by Delta and Wausau	possible return to part-time work	1996
Dr. Bradley Diner, IME psychiatrist	disabled until put through pain treatment and off pain medication	
Dr. Earl Peeples, IME with Wausau Insurance Company, workers' compensation carrier for Delta	did not return Petitioner to work	1993
Dr. Tad Pruitt, IME with the Wausau and Delta workers' compensation carrier	could return to work, but did not take into account mental illness/depression which could restrain him from work	1998
Dr. Jim J. Moore, neurosurgeon (IME)	totally disabled	1998

Dr. Anthony Russell	since a quadriplegic is able to work, the Petitioner is able to work	1998

In summary, the Respondent Plan in this matter continued to send, along with the compensation carrier, the Petitioner to various doctors. Every one of the Petitioner's treating physicians indicated that there was no way the Petitioner could return to work. The lower court indicates that the Plan's final decision clearly took these opinions into account. A reasonable person in reading these opinions, could not come to that conclusion.

More importantly, the lower court ignored the fact that the Plan unreasonably picked pieces of various medical reports from doctors ignoring the doctors' recommendations for pain treatment, therapy and other modalities to assist the Petitioner in a return to work. Also, they ignored the fact that these doctors also indicated that other factors, such as the depression and psychiatric problems also were preventing the Petitioner from returning to work.

The Respondent Plan in the lower court action criticized the district court for what it considers to be a substitution of the court's judgment as to the sufficiency of the medical evidence for the Plan's own assessment and discretion. If the lower court's approval of the Plan's position is accepted, then the abuse of discretion standard has little meaning or use except for the reviewing court to determine whether or not at least one physician has opined that the Petitioner or Claimant can return to work. Surely, such an approach is not consistent with this court's approach of an abuse of discretion standard.

CONCLUSION

The Court of Appeals has indicated that a disability fiduciary such as the Respondent in this matter acting in concert with a workers' compensation carrier for the same entity is not something that rises to the level of a conflict of interest or serious procedural irregularity. The court should grant certiorari to review this important issue and to define what is a conflict of interest with serious procedural irregularity and whether or not the facts of this case rise to such a level. In addition, the Eighth Circuit Court of Appeals found that the Plan in this matter was allowed to pick and choose portions of six different independent medical evaluations as opposed to the Petitioner's treating physicians. Again, the court should grant certiorari to review this important matter as to whether or not this is reasonable or an abuse of discretion.

Respectfully submitted,

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Nos. 00-3441/3923

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Delta Family-Care Disability and Survivorship Plan,
Appellant,

v.

Harold Marshall,
Appellee.

May 17, 2001, Submitted

July 31, 2001, Filed

PRIOR HISTORY:
Appeal from the United States District Court for the Eastern District of Arkansas.

DISPOSITION:
Judgment of district court vacated and direct that judgment be entered in favor of Plan; district court's award of attorneys' fees to Marshall vacated.

COUNSEL:
For HAROLD MARSHALL, Plaintiff - Appellee: Brian Paul Boyce, William Charles Frye, FRYE & BOYCE, Little Rock, AR.

For DELTA FAMILY-CARE DISABILITY AND SURVIVORSHIP PLAN, Defendant - Appellant: Myron Timothy Boe, David P. Martin, ROSE LAW FIRM, Little Rock, AR, Hunter R. Hughes, III, J. Timothy McDonald, ROGERS & HARDIN, Atlanta, GA.

JUDGES:
Before BOWMAN and BEAM, Circuit Judges, and KYLE, District Judge.[1]

OPINION BY:
KYLE

OPINION:

KYLE, District Judge.

Delta Family-Care Disability and Survivorship Plan ("the Plan") appeals from the final judgment entered by the district court in favor of Harold Marshall ("Marshall"), directing the Plan to reinstate Marshall's long-term disability benefits pursuant to the Employment Retirement Income Security Act of 1974 ("ERISA"), *29 U.S.C. § 1132*(a)(1)(B). The Plan argues that, while the district court identified the correct standard for reviewing the Plan's decision -- a deferential "abuse of discretion" standard -- the court misapplied that standard when it reviewed the administrative record and concluded that the Plan administrator's decision was not supported by substantial evidence.[2] The Plan also appealed from a subsequent order granting in part Marshall's request for attorney's fees. We reverse the district court's judgment reinstating Marshall's long-term disability benefits and vacate the Order awarding fees.

I. Background

A. Marshall's Injury and Treatment Therefor

From approximately 1979 to 1991, Marshall worked as a non-pilot employee for Delta Airlines, most recently as a senior customer service agent. In March 1989, he sustained a lower back injury at work.[3] Marshall continued to work at Delta, and pursued non-invasive treatment for his back, until September 1991. When Marshall's back problems persisted,

orthopaedic surgeon Harold Chakales performed a laminectomy and fusion in November 1991. The fusion involved the spine from the L-4 vertebra in Marshall's lower back to the sacrum. By a letter dated January 2, 1992, Dr. Chakales advised Delta that recovery from such spinal fusion surgery takes anywhere from two to five years.

Following his surgery in 1991, Marshall remained under the care of Dr. Chakales, who periodically submitted statements to the Plan advising it of Marshall's status. In July 1994, Dr. Chakales performed a second back surgery to remove hardware associated with the spinal fusion. On January 4, 1995, Dr. Chakales assigned a 35% anatomical impairment to Marshall's body as a whole. On April 24, 1995, Dr. Chakales stated in his progress notes that Marshall's spinal surgery had reached maximum healing, and that he was discharging Marshall from his care -- Marshall could return to see Dr. Chakales on an "as needed" basis. Following his discharge, Marshall returned to Dr. Chakales every four to eight weeks to receive treatment for the pain in his lower back and legs. At the end of 1995, Dr. Chakales informed the Plan that Marshall was unable to work in his regular employment or in any other type of work.

In April 1993, while treating Marshall's spine injury, Dr. Chakales referred Marshall to a psychiatrist, Dr. Henry Good. Dr. Good treated Marshall with psychotherapy and drug therapy for depression associated with chronic pain syndrome. Sometime in 1994, Dr. Good retired, and Dr. Raymond Remmel took over Marshall's psychiatric care, continuing with drug therapy. On November 7, 1994, Dr. Remmel opined that Marshall was unable to work due to his chronic pain, traumatic injury, and "unremitting depression." On April 6, 1995, Dr. Remmel assessed Marshall as being disabled by "morbid depression." Throughout his treatment of Marshall, Dr. Remmel has reported that Marshall is disabled due to his depression.

In October 1997, Dr. Chakales reported that Marshall was suffering from post-laminectomy syndrome and chronic pain syndrome. Dr. Chakales noted that, from a chronic pain standpoint, while Marshall would never be pain-free, he was able to manage his pain with two to three "Tylenol 4" per day and doses of another pain medication called Soma. Dr. Chakales stated that the combination seemed effective and was "basically a low maintenance dosage." On January 8, 1998, Dr. Chakales repeated his assessment that Marshall was unable to work in any job, adding that Marshall was "not able to be rehabilitated."

B. Marshall's Claim for Long-term Disability Benefits.

The Plan is a non-contributory employee welfare benefit plan available to eligible non-pilot employees of Delta Airlines, Inc. -- it provides both short-term and long-term disability benefits. An employee is eligible for long-term disability benefits under the Plan "provided he is disabled at that time as a result of demonstrable injury or disease (including mental or nervous disorders) which will continuously and totally prevent him from engaging in any occupation whatsoever for compensation or profit, including part-time work."

On March 5, 1992, after receiving the maximum amount of short-term benefits allowed under the Plan, Marshall signed a claim notice for long-term disability benefits. In support of his claim, Marshall submitted an "Attending Physician's Statement" from Dr. Chakales stating that Marshall was "totally disabled" both for his regular job and for any occupation. The Plan approved Marshall's claim for long-term disability benefits on March 18, 1992. The Plan paid long-term disability benefits to Marshall until March 31, 1998.

During the six years in which he received long-term disability benefits, Marshall underwent several Independent Medical Examinations ("IMEs") by orthopaedists and

Independent Psychiatric Examinations ("IPEs") by psychiatrists, at the request of the Plan. Three examinations are pertinent to the pending appeal.[4]

On April 3, 1996, orthopaedist William Blankenship performed an IME. Dr. Blankenship concluded that Marshall was at that time capable from a physical standpoint of performing "some type of work in the form of restricted or light duty, clerical, and part-time." Dr. Blankenship stated that the work should be sedentary in nature and should not require a lot of bending or stooping.

The following month, Marshall underwent an IPE by Stephen C. Buchanan, M. D., a psychiatrist. Dr. Buchanan stated that Marshall seemed to be totally disabled physically in that he was unable to sit or stand for any length of time, his concentration was impaired by the medications that he was taking, and his energy level and ability to relate to others were impacted by his depression. Dr. Buchanan opined that Marshall was "likely" to be chronically incapacitated, but also thought it was "possible" that Marshall could work some kind of job from his home involving the telephone, at which Marshal could set his own hours. Dr. Buchanan recommended that Marshall receive psychotherapy with a psychotherapist. On July 10, 1996, Dr. Buchanan submitted an addendum to his report stating that he had subsequently reviewed the report of Dr. Blankenship's IME and concluded that, whatever one might say about whether Marshall was disabled from an orthopaedic perspective, one could nevertheless say that Marshall was totally disabled due to his depression, chronic pain, and his need to take medications that impair his concentration.

One year later, Marshall underwent a second IPE, this time performed by Bradley Diner, M. D., a psychiatrist.[5] After meeting with Marshall and evaluating his records, Dr. Diner concluded that Marshall's pain was not fully associated with non-psychiatric medical or neurological findings. Dr.

Diner also noted that Marshall's depression had been only superficially addressed because the psychiatric intervention has mainly focused on pain management. Dr. Diner also raised a concern about what he regarded as Marshall's "overuse" of pain medications and recommended a pain management program.[6] Dr. Diner concluded that there was nothing from a psychiatric standpoint to prevent Marshall from working; his depression was not severe enough to warrant any significant disability. Accordingly, Dr. Diner opined that Marshall was immediately capable of performing some type of work, particularly of a sedentary nature, that offered the freedom to take breaks as needed and set self-determined hours.

The Plan also required Marshall to submit to a Functional Capacity Evaluation with a physical therapist on March 12, 1998. Barbara Morris, M.S., performed an evaluation lasting several hours from which she concluded that, from a physical standpoint, Marshall was capable of performing some type of work in the sedentary category with lifting restrictions of 25 pounds.

C. The Plan Terminates Marshall's Long Term Disability Benefits

On March 30, 1998, the Plan sent a letter to Marshall informing him that, based on Dr. Diner's IPE, the Functional Capacity Evaluation performed by the physical therapist, Dr. Blankenship's IME, and surveillance reports indicating that Marshall was seen walking without a cane and driving a car, Marshall no longer met the eligibility requirements for long-term disability benefits. The Plan was therefore terminating Marshall's benefits effective April 1, 1998. The letter also explained Marshall's appeal rights.

When the Plan terminates an employee's long-term disability benefits, the employee may appeal that decision administratively. That process has two levels. At the first level, a subcommittee (whose members are appointed by the

Administrative Committee of the Plan) reviews the challenged decision.[7] If the subcommittee decides the appeal against the employee, the employee may appeal that decision to the Administrative Committee itself. At each level, the employee may submit any written evidence or arguments that he wishes to support his claim for benefits.

Marshall timely appealed the termination of his benefits to the subcommittee. In support of that appeal, Marshall submitted additional medical documentation from Drs. Chakales and Remmel. Dr. Remmel stated, in a report dated April 6, 1998, that he "cannot and will not release Mr. Marshall to return to work." Dr. Chakales described Marshall as suffering from "post lumbar laminectomy syndrome with chronic low grade spinal arachnoiditis with chronic nerve root irritation" and reported on April 24, 1998, that Marshall was still disabled and was a "poor rehabilitative candidate." Marshall also submitted to the Plan a vocational assessment report from Pinnacle Rehabilitation. The vocational assessment indicated that, based upon the medical evaluations of Drs. Chakales and Remmel, it was neither physically nor psychologically appropriate for Marshall to return to work.[8]

In response to Marshall's appeal, the Plan asked Marshall to undergo two further IMEs. On June 17, 1998, Marshall underwent an Independent Orthopaedic Evaluation by Tad Pruitt, M.D. Dr. Pruitt spent approximately one and a half hours examining Marshall and another two hours reviewing his medical records and preparing his report. Dr. Pruitt concluded that Marshall might, from a physical standpoint, be able to perform a sedentary clerk's job if he were able to ease into the job by starting with just a couple of hours at a time and if he were able to move around as needed. Dr. Pruitt stated, however, that he could not appropriately comment on Marshall's mental ability to perform the job and noted that Marshall's subjective issues -- his mental problems and chronic pain -- may continue to limit him. Dr. Pruitt also

raised a concern about Marshall's dependence on chronic pain medicines.

Two days later, Marshall underwent an IME by neurological surgeon, Anthony Russell, M.D. Dr. Russell concurred in Dr. Pruitt's findings and stated his belief that Marshall was not totally disabled to the point that he could no longer engage in any gainful employment. Dr. Russell continued:

> I realize it is not proper to use specific illustrations in order to form an opinion, however, if we use someone who is severely injured, such as Christopher Reeves, a patient with a C1-C2 fracture, who is unable to walk or breath for himself, then obviously Mr. Marshall's injury falls somewhere short of that degree of disability. On the other hand, Mr. Reeves has been able to resume employment. The ability to work is typically more a function of motivation rather than actual ability to engage in certain activities.

Dr. Russell concluded that the main limiting factor for Marshall was his subjective pain. The Plan submitted additional documents from Marshall's treating psychiatrist to Dr. Diner, the psychiatrist who had completed Marshall's 1997 IPE, for his review. Dr. Diner concluded that Dr. Remmel's letter did not change the opinion he expressed in 1997.

Marshall was accepted as permanently and totally disabled by the Arkansas Worker's Compensation Commission on September 1, 1998, a fact known to the Plan. On September 22, 1998, the subcommittee notified Marshall that it was affirming the Plan's initial decision to terminate Marshall's benefits "based on the evidence presented that

[Marshall] is able to perform some type of work other than his customary occupation." By a letter dated December 15, 1998, Marshall appealed this determination to the Administrative Committee. On February 22, 1999, the Administrative Committee notified Marshall that his appeal was denied because medical evidence showed that he was physically and psychologically capable of doing some work.

D. The District Court Action

On September 10, 1999, Marshall filed a one-count complaint under § 1132(a) of ERISA seeking reinstatement of his long-term disability benefits. On June 2, 2000, the Plan filed a Motion for Summary Judgment and submitted to the Court the administrative record that was before the Plan when it made its decision to discontinue Marshall's benefits. Marshall opposed the motion and, the Plan argues, relied in part on documents that had not been presented to the Plan during the administrative process and/or had not been produced by Marshall during discovery.

The district court determined that the abuse of discretion standard applied and reviewed the record before the Plan for "substantive evidence" in support of its decision. The district court first observed that "the evaluations by the non-treating physicians were in conflict." The district court then noted that the only consistent evidence before the Plan came from Marshall's treating physicians, who have maintained throughout the relevant time period that Marshall was totally disabled. The district court determined that it was not reasonable for the Plan to disregard this "overwhelming evidence" from the doctors most knowledgeable about Marshall's condition. The district court further reasoned that the evidence in the administrative record on which the Plan relied came from evaluators who were "isolated to a particular specialty" and, therefore, did not take into account all of Marshall's problems. The district court held that the Plan's decision to terminate Marshall's benefits was not

supported by substantial evidence and directed the Plan to reinstate Marshall's long-term disability benefits. This appeal followed.

II. Standard of Review

ERISA provides a plan beneficiary with the right to judicial review of a benefits determination. *29 U.S.C. § 1132*(a)(1)(B). An ERISA plan administrator's decision to terminate benefits is reviewed under an abuse-of-discretion standard where the plan gives the administrator discretion to determine eligibility for benefits and to construe the terms of the plan. *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989).* As discussed above, the district court applied the abuse-of-discretion standard. Marshall does not dispute that the Plan contains the discretionary language necessary to merit an abuse-of-discretion standard;[9] rather, he argues that the circumstances in this case require a more rigorous standard of review.

A court will review a plan administrator's decision to deny benefits under a less deferential standard where the plan beneficiary presents "material, probative evidence demonstrating that (1) a palpable conflict of interest or serious procedural irregularity existed, which (2) caused a serious breach of the plan administrator's fiduciary duty to him." *Woo v. Deluxe Corp., 144 F.3d 1157, 1160 (8th Cir. 1998).* Marshall's primary contention is that there was a serious procedural irregularity in the Plan's handling of his claim because the Plan received information from and allegedly acted in concert with Delta's workers' compensation carrier for purposes of reducing or eliminating benefits payable to him. Marshall complains that the Plan received and used IMEs that he had undergone in connection with his pending workers' compensation proceeding. The record before the Plan contained notes from the workers'

compensation adjuster, IMEs, and a surveillance report regarding Marshall's physical activities.[10]

We conclude that, on the facts of this case, there was no "serious procedural irregularity" in the Plan's consideration and use of information obtained in connection with Marshall's workers' compensation proceeding. Indeed, Marshall himself submitted reports and correspondence that his physicians had addressed to Wausau Insurance, apparently in connection with Marshall's workers' compensation claim. Marshall also forwarded to the Plan a copy of the report prepared by Dr. Russell (whom Marshall identifies in his handwritten letter as "the doctor Wausau sent me to be seen by.") As for the surveillance report, we note that there is nothing procedurally improper about the use of surveillance. See *McGarrah v. Hartford Life Ins. Co., 234 F.3d 1026, 1028-29 (8th Cir. 2000)*. Accordingly, we decline to depart from the abuse-of-discretion standard warranted by the language of the Plan.

III. Application of the Abuse-of-Discretion Standard

We review a district court's application of the abuse-of-discretion standard de novo. *Fletcher-Merrit v. NorAm Energy Corp., 250 F.3d 1174, 1179 (8th Cir. 2001)*. Under an abuse-of-discretion standard of review, a plan administrator's decision to deny or terminate benefits must stand if it is reasonable, that is, if it is supported by "substantial evidence." Id.; *Donaho v. FMC Corp., 74 F.3d 894, 899 n. 9 & 900 (8th Cir. 1996)*. Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York v. N.L.R. B., 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938)*. So long as the plan administrator's "findings are reasonable, they may not be displaced on review even if the court might have reached a different result

had the matter been before it de novo." *Donaho, 74 F.3d at 900.* Ultimately,

> a trustee decision is reasonable if a reasonable person could have reached a similar decision, given the evidence before him, not that a reasonable person would have reached that decision. Put another way, the committee's decision need not be the only sensible interpretation, so long as its decision offers a reasoned explanation, based on the evidence, for a particular outcome.

Id. at 899 (emphasis in original) (internal quotation marks and citations omitted).

The Plan argues that the district court erred in holding that the decision to terminate Marshall's benefits was "unreasonable" because the district court (1) improperly determined the weight to be given to various medical reports; (2) incorrectly concluded that the Plan should have given deference to Marshall's treating physicians; and (3) incorrectly found that the Plan disregarded the opinions of Marshall's treating physicians. The Plan further contends that the district court should have viewed the administrative record underlying the decision as a whole, rather than focusing on isolated portions of various doctors' opinions.

We agree with the Plan that the district court incorrectly reasoned that the Plan should have accorded greater deference to the opinions of Marshall's treating physicians. As authority for this proposition, the district court relied solely on *Donaho v. FMC Corp., 74 F.3d 894 (8th Cir. 1996).* The administrative record in this case, however, is much different from the record before the plan administrator in Donaho. The only doctor who opined that Donaho was not disabled was a physician who had merely reviewed her

medical records and had never examined her. We therefore stated in Donaho that "where the reviewing physician's conclusions are contradicted by an examining physician and two treating physicians, reliance on the reviewing physician's conclusions seems especially misplaced and constitutes an abuse of discretion." *Donaho, 74 F.3d at 901* (emphasis added). As we recently observed, however, a treating physician's opinion does "not automatically control, since the record must be evaluated as a whole." *Fletcher-Merrit, 250 F.3d at 1180 n. 3* (citing *Bentley v. Shalala, 52 F.3d 784, 786 (8th Cir. 1995)).*

Here, the Plan did not base its decision to terminate benefits on the report of any physician who had merely reviewed Marshall's medical records. All of the doctors who conducted Marshall's IMEs and IPEs examined him and included in their reports information regarding their observations of Marshall's then-present condition. The question of deference as between the conclusions of a treating physician and a physician who has merely reviewed medical records is not at issue here. On that issue, Donaho is not controlling.

"The unreasonableness of a plan administrator's decision can be determined by both the quantity and quality of the evidence supporting it." *Donaho, 74 F.3d at 900.* There is certainly a quantity of evidence in this extensive record both for and against Marshall's claim to continuing long-term disability benefits.[11] Marshall's treating physicians, Dr. Buchanan (who performed an IPE in 1996) and Dr. Moore submitted reports stating that Marshall was totally disabled, either physically or psychologically. On the other hand, the 1996 IME of Dr. Blankenship, the 1997 IPE of Dr. Diner (supplemented in 1998 in response to materials submitted by Marshall's treating psychiatrist), the 1998 IME of Dr. Pruitt, the 1998 IME of Dr. Russell, the 1998 Functional Capacity Examination by the physical therapist, and the surveillance report of Marshall's observed capacity to engage in certain

daily activities support the conclusion that Marshall was not totally disabled either physically or psychologically.

With respect to the quality of the evidence before the Plan, the district court (and Marshall's counsel at oral argument) focused on Dr. Russell's analogy between Marshall's situation and that of actor Christopher Reeves. Dr. Russell acknowledged in his report that such an analogy may be inappropriate. That analogy does not, however, clearly invalidate the observations Dr. Russell made during his examination of Marshall -- observations reported by Dr. Russell prior to the "Christopher Reeves" letter. To the extent Dr. Russell's comments may be considered an expression of bias, we also note that, in 1998, Marshall's treating psychiatrist clearly and passionately articulated his view that Marshall was being "harassed" by Delta Air Lines and the Plan, going so far as to opine that Marshall should sue the Plan. The district court did not consider whether Dr. Remmel's comments were evidence of a lack of objectivity on his part.

Finally, all of the medical information available to the Plan, both the reports prepared by Marshall's own treating physicians and those prepared by the doctors who performed the IMEs and IPEs, came from specialists. Therefore, the district court's criticism of the Plan's reliance on the reports of evaluators who were "isolated to a particular specialty" is without merit -- Marshall's treating physicians were an orthopaedic surgeon and a psychiatrist. Based on our review of the record, we cannot conclude, as the district court did, that the Plan "disregarded" the reports of Marshall's treating physicians. Indeed, the Plan's final decision letter clearly demonstrates that the Plan did consider those reports.

Where the record reflects conflicting medical opinions, the plan administrator does not abuse its discretion in finding the employee not to be disabled. *Donaho, 74 F.3d at 901.* We conclude that conflicting medical opinions were presented to

the Plan, and that there was "substantial evidence" to support the Plan's decision to terminate Marshall's long-term disability benefits. The Plan's decision was reasonable and the district court should not have overturned it.

IV. Conclusion

Having determined that the Plan's decision to terminate Marshall's long-term disability benefits was reasonable, we vacate the judgment of the district court and direct that judgment be entered in favor of the Plan. We further vacate the district court's award of attorneys' fees to Marshall.

Footnotes

[1] The HONORABLE RICHARD H. KYLE, United States District Judge for the District of Minnesota, sitting by designation.

[3] Marshall sustained an earlier lower back injury in 1980 when he was struck in the back at work by a piece of falling equipment. To repair the injury suffered in that accident, Marshall underwent back surgery in 1980. Marshall made a good recovery from that surgery and returned to work at Delta.

[4] Two other examinations occurred before Marshall underwent surgery in 1994 to remove the hardware implanted in connection with his spinal fusion. The Plan did not base its decision to terminate Marshall's benefits on either of these examinations.

[5] The Plan sent Marshall to Dr. Diner because Dr. Buchanan was no longer practicing in the Little Rock area.

[6] Approximately three months later, in October 1997, Marshall's own orthopaedist, Dr. Chakales, reported that Marshall was taking fewer doses of pain medications than Dr.

Diner had reported. Furthermore, Dr. Chakales described the dosage of pain medications Marshall was taking as "basically a low maintenance dosage."

On January 8, 1998, Marshall's own psychiatrist, Dr. Remmel, responded to the pain medication issue raised in Dr. Diner's report. Dr. Remmel stated that he had ruled out any overuse or abuse by Marshall and indicated that he himself prescribed much of the pain medications Marshall took. Dr. Remmel concluded: "I would recommend that [Delta Air Lines] cease the constant harassment of this unfortunate gentleman who suffered a severe injury while in the service of [Delta] and now lives with unremitting pain."

[7] The "Administrative Committee" is the administrator of the Plan, vested with "the operation and administration of the Plan . . . the exclusive power to interpret it, and the responsibility for carrying out its provisions."

[8] On June 24, 1998, Marshall's counsel arranged for him to be evaluated by James Moore, M. D., a neurosurgeon, who concluded that Marshall was "severely compromised in any abilities to work" and was not "a candidate to return to the workforce."

[9] The Administrative Committee is expressly granted "the discretionary authority to interpret and construe the Plan, and decide all questions of eligibility of any Eligible Family Member to participate in the Plan or to receive benefits under it, its interpretation and decision to be final and conclusive."

[10] The report indicates that Marshall drove a car on several occasions during the course of the surveillance and was observed walking to the mailbox without the assistance of a cane.

[11] Marshall argues that the Plan's decision to terminate Marshall's disability benefits was unreasonable in light of the Arkansas Workers' Compensation Commission's determination in September of 1998 that Marshall was

permanently and totally disabled. We have observed, however, that a governmental award of disability benefits is not inherently inconsistent with a decision that an employee is not eligible for disability benefits under an ERISA plan. See e. g., *Schatz v. Mutual of Omaha Ins. Co., 220 F.3d 944, 950 n. 9 (8th Cir. 2000)*. Nor is a governmental award of disability benefits controlling on the question of whether the ERISA plan should provide disability benefits. Indeed, if it were, the actions of a governmental agency would effectively strip the plan administrator of his discretion granted by the language of the benefits plan.

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

CASE No. 4:99cv00657GH

HAROLD MARSHALL
PLAINTIFF

vs.

DELTA FAMILY-CARE DISABILITY SURVIVORSHIP PLAN
DEFENDANT

MEMORANDUM OPINION AND ORDER

Plaintiff brings this action pursuant to the Employee Retirement Income Security Act of 1974 ERISA 29 U.S.C. § 1001 e.t seq., seeking long term disability benefits. On April 1, 1998, defendant denied plaintiff long term disability benefits (LID) in accordance with Delta Family-Care Disability and Survivorship Plan (the "Plan"), Section 4.03, Long Term Disability, which states in relevant part: "... The Employee shall be eligible for Long Term Disability provided he is disabled . as a result of demonstrable injury or disease.. . which will continuously and totally prevent him from engaging in any occupation whatsoever for compensation or profit, including part-time work.
-" (DP 029)[1]

The Plan is a non-contributory employee welfare benefit plan as defined in 29 U.S.C. §
1002(1), established and maintained punsant to ERESA. It provides both short-term and long-term disability benefits, as well as other benefits, to non-pilot Delta Air Lines employees. The

Administrative Committee of Delta Air Lines, Inc. ("Administrative Committee") is the Plan Administrator and the Named Fiduciary for purposes of the Plan's operation and administration.

Section 1201 of the Plan states that the Administrative Committee has the exclusive power to interpret the Plan.[2] The powers and duties of the Administrative Committee as set forth in Section 12.02 of the Plan include the discretionary authority to interpret and construe the Plan and to decide all questions concerning the Plan. Additionally, Section 12.02 provides that "[t]he Administrative Committee shall have the broadest discretionary authority permitted under law in the exercise of all its functions including, but not limited to, deciding questions of eligibility, interpretation, and the right of benefits hereunder..."

The Plan has established a two-level review procedure to allow claimants to appeal claim denials. The Administrative Subcommittee of Delta Air Lines, Inc. (the "Administrative Subcommitte") provides the first level of review. The second level of review is by the Administrative Committee. At either level, the claimant and his or her representative may review Plan documents and submit any written evidence or arguments the claimant wants to support his or her position.

Plaintiff was first injured in 1979, when he was struck in the back by a piece of airplane. He was referred to Harold H. Chakales, MD., who diagnosed plaintiff as having problems with a disc in his back and on February 28, 1980, Dr. Chakales excised two discs from the back. Plaintiff returned to work until 1989, when he was subsequently hit in the lumbar spine area. Dr. Chakales, who treated plaintiff performed a spinal fusion in November, 1991 (HM 158). In 1992 or 1993,Dr. Chakales removed the hardware (HM 195)

Plaintiff first began receiving Short-Term Disability benefits under the Plan for a period of twenty-six weeks, through March 4, 1992. (HM 036).[3] He began receiving LTD benefits from March of 1992.[4]

On September 7, 1993, plaintiff underwent a psychological examination by Dr. Winston T Wilson, a clinical psychologist (JIM 127-128). Dr. Wilson diagnosed plaintiff with Hypochondriasis He opined that plaintiff should return to work, particularly work that would not stress his back.

On September 17, 1993, plaintiff was also evaluated by Earl Peeples, M.D. (an orthopedist), who agreed with Dr. Wilson that a return to light duty work would be in plaintiff's best interest (HM 129).

On November 29, 1993, Dr. Chakales provided a follow up report on plaintiff's progress. He found that plaintiff was still disabled (HM 139). By letter dated December 29,1993, Plaintiff was notified that he would be continued on LTD benefits in light of Dr. Chakales' report (HM 142).[5]

Dr. Robert Abraham performed a workers compensation neurological independent medical evaluation ("IME") on March 14, 1994 (JIM 158-159). Dr. Abraham found that plaintiff has a significant disability with regard to his lumbar spine, and that he is unable to be gainfully employed at any level. He recommended that plaintiffs hardware be removed.

Dr. Henry Good, a psychiatrist who treated plaintiff for depression, reported on March 31, 1994, that plaintiff was disabled from any kind of work He did not view vocational retraining as a consideration (HM 163-164).

Dr. Raymond Remmel, a psychiatrist, began treating plaintiff for major depression and chronic pain beginning in Septmber, 1994. In October, 1994, Dr. Remmel reported that plaintiff's employment future was "poor" and it was unknown if plaintiff would be able to engage in some type' of work (HM 169). Six months later, Dr. Remmel continued to report that plaintiff's employment future was "poor" and that plaintiff would never be able to engage in any work (HM 178).

Dr William F. Blankenship, an orthopedic surgeon, performed an lME on plaintiff on April 3, 1996 (HM 194-199) Dr. Blankenship opined that plaintiff was capable of some type of work in the form of restricted or light duty, clerical, and part-time, which would be sedentary in nature Dr. Blankenship did not discuss plaintiff's psychological problems or his medication.

Dr. Steven C. Buchanan performed a psychiatric IME on May28, 1996, at the request of the Plan (JIM 206-213). Dr. Buchanan noted that plaintiff is depressed, and is impaired with regard to concentration and ability to relate to others because of the pain medication he is taking as well as his depression. Dr. Buchanan found plaintiff to be totally disabled, particularly with regard to his inability to sit or stand for any length of time. In response to the Plan's question as to whether Dr. Buchanan believed that plaintiff is able or will be able to perform some type of work, Dr. Buchanan stated: "My experience is that individuals in this situation are likely to be chronically incapacitated. Barring some new factor or intervention, Mr. Marshall is not likely to make much improvement" (HM2 10) Dr. Buchanan recommended that plaintiff continue with anti-depressant therapy and with psychotherapy. Dr. Buchanan felt that with six months to a year of psychotherapy, particularly dealing with chronic pain, plaintiff might improve to the point where he might be able to return to work of some kind. Dr.

Buchanan also stated that plaintiff could possibly perform some type of work out of his home, involving a telephone and in which he could set his own hours (JIM 211).

In an addendum dated July 10, 1996, in response to Dr. Blankenship's evaluation, Dr. Buchanan reiterated that he believed plaintiff to be totally disabled due to his depression, his chronic pain and his need to take medications which impair his concentration *(EM* 212).

Dr. Bradley Diner performed a psychiatric IME on July 15, 1997, a t the *request* of the Plan EM 228-235). Dr. Diner found that there was "nothing from a psychiatric standard which should prevent [plaintiff] from working." Dr. Diner believed plaintiff to be capable of performing some type of work, "particularly one of a sedentary nature which would provide some freedom for breaks and self-determined hours." (HM 233). He was concerned about plaintiff's overuse of pain medicines and recommended that plaintiff be admitted to a formal pain management program.

On January 19, 1998, the Plan notified plaintiff that the amount to be paid under the LTD would be increased because the workers compensation benefit would not longer be an offset (HM 241)

On March 12, 1998, at the request of the Plan, a physical therapist at Health South performed a functional capacity evaluation (EM 256- 262). The evaluator concluded that plaintiff could perform some type of work in a sedentary category with a lifting restriction. However, the evaluation lasted only about three hours and 45 minutes because of plaintiff's self -limiting behaviors.

In a March 30, 1998, letter from the LTD department, plaintiff was informed that he no longer qualified for LTD disability benefits as of April 1, 1998, and that he could

appeal the decision.[6]

In an April 6, 1998, letter Dr. Remmel noted that he had been treating plaintiff since 1993. He states, in relevant part:

> Mr. Marshall suffers constantly from symptoms of dysphoria and depression There is no evidence that these symptoms existed prier to his work-related accident, Since that time his depression and dysthymia have been extremely difficult to treat and have required both medications and psychotherapy. We have also attempted to ameliorate his chronic intractable back pain. There does not appear to be any surgical solution at this time and I am fearful that Mr. Marshall will have to live with this the rest of his life.
>
> There is no doubt in my mind that Mr. Marshall is permanently and totally disabled secondary to his psychiatric illness along adding to his physical disability and his long term situation is made even more grim.
>
> I cannot and will not release Mr. Marshall to return to work at this time nor do I anticipate that I would do it in the following years. It is my understanding that Dr. Chakales is in agreement with this. It is very unfortunate that Mr. Marshall has had to go through the humiliation and degradation of seeing non-treating physicians aid therapists who have no understanding of his history and basically have offered him little in terms of real help. (HM 267-268)7

By letters dated April20, and May 4, 1998, Plaintiff notified the Administrative Subcommittee that he sought to appeal the March 30, 1998, termination of his benefits (HM 270, 283)

A letter from Dr. Chakales, dated April 13, 1998, states that plaintiff is still disabled and unable to work. "I do not recommend any aggressive treatment or any work hardening. . . From a clinical standpoint I believe he is a poor rehabilItative candidate. I will continue to see him on a p.r.n. basis." (EM 290). A report from Dr. Chakales, dated April 24, 1998, reiterates Dr. Chakales' opinion and notes that plaintiff's prognosis is "guarded" (HM 272).

At the request of plaintiff's counsel, a vocational assessment was performed on May 14, 1998 HM 298 301). The vocational rehabilitation counselor reviewed the records in the case, and found that "[b]ased upon the current evaluations of Dr. Chakales and Dr. Remmel, it would not be physically or psychologically appropriate for (plaintiff) to return to work at this time" (EM 300). The evaluator noted that the Health South functional capacity evaluation did not address psychologically appropiate work settings.

In a letter dated May 18, 1998, the Administrative Subcommittee notified plaintiff that his appeal would be reviewed at its June 16, 1998, meeting (HM 303).

On June 17, 1998, plaintiff was sent by defendant to Dr Tad Pruitt, an orthopedist, for an IME (HM 339 347). Dr. Pruitt evaluated plaintiff for about 1 ½ hours. Dr. Pruitt noted that plaintiff could possibly perform the job description of clerk if he was able to self-limit his activities. Dr. Pruitt noted that plaintiff would need to be "eased into" the job, starting with one or two hours and progressing if he was able to tolerate it. Dr. Pruitt's recommendation that plaintiff perform the minimal sedentary work ia not without reservation That

is, Dr. Pruitt's recommendation was based purely on plaintiffs physical condition. Dr. Pruitt notes that plaintiff's depression and use of pain medications may restrict him even more than the limited work Dr. Pruitt believed plaintiff could physically tolerate. Dr. Pruitt finds that plaintiff "is a patient with severe pain secondary to back surgery who has had this disabling condition now for over eight years. It has been complicated by significant depression and is unlikely to improve significantly over time." (HM 344).

On June 24, 1998, plaintiff went to Dr. Jim J. Moore, a neurosurgeon, for an IME arranged by plaintiff's attorney (HM 350-352). Dr. Moore found that plaintiff is "severely compromised in any abilities to work" and that he is not a "candidate to return to the work force." (HM 351, 352). Again, like Dr. Pruitt, Dr. Moore noted that plaintiffs psychological problems further limited plaintiff

On August 10, 2000, Dr. Russell, a neurosurgeon, set forth the results of his evaluation that was requested by the attorney for the workers compensation carrier. (HM 400-401). Dr Russell did not believe that plaintiff was totally disabled, particularly in comparison with the actor Christopher Reeves. Dr. Russell believed that plaintiff could work as a telephone solicitor.

Gay Signoff, a vocational counselor, performed a vocational assessment on plaintiff in August, 1998, in connection with plaintiffs works compensation claim (HM 391-398). She states that at the time she assessed plaintiff he was on the following medications: Soma, 350 mg, two tablets every four hours; Tylenol 4 with Codeine, two tablets every four hours; Accupril, 40 mg., taken for blood pressure twice a dsy Serzone, 150 mg, taken twice a day for depression; Verlan, 240 mg., taken once a day for blood pressure and cholesterol; Lescol, 40 mg., taken once a day for blood pressure and cholesterol; Phenergan, 50 mg., taken four days

a day for nausea; Restoril, taken at bed time for sleep; Colestid, 1 mg taken once a day for cholesterol. (HM 392). She discussed with plaintiff what type of work he would be interested in if he were able to return to work. Based on that, she recommended that a Transferable Skills Analysis be conducted to determine appropriate occupations based on the guidelines set forth by those physicians who opined that plaintiff could work (HM 397).

On September 1, 1998, Terry Pence, Esq., advised the Administrative Law Judge of the Workers' Compensation Commission that the Second Injury Fund acknowledged that plaintiff is permanently and totally disabled (HM 482-483)

Consideration of plaintiff's appeal was postponed at the Administrative Subcommittee's request to September 15,1998 (HM 361) In a letter dated September 22, 1998, Beverly Hord, Secretary of the Administrative Subcommittee, notified plaintiff's counsel that the Administrative Subcommittee reviewed the appeal of the denial of LTD benefits and maintained the original determination (HM 412). Hord further stated: "Following a thorough review of all the information contained in the file and in accordance with Section 4.03 of the [Plan], the Administrative Subcommittee agreed with the original determination that benefits were correctly denied effective April 1, 1998, based on the evidence presented that Mr. Marshall is able to perform some type of work other than his customary occupation" (EM 416). Plaintiff was advised that he could request further review by the Administrative Committee.

By letter dated December 15, 1998, plaintiff, through his counsel, requested review by the Administrative Committee (HM427-428). By letter dated February 22,1999, FrancesM. Bresnahan, Secretary of the Administrative Committee, notified plaintiff, through his counsel, that the

Administrative Committee voted to uphold the denial of LTD benefits under the Plan HM (015-018). Bresnahan states:

> The Committee noted the numerous opinions, including an FCE and a vocational assessment, concurring that your client is able to perform some type of work. In addition, the committee noted that your own client stated in a deposition prior to his denial of benefits that he would return to work within certain restrictions. Based on all of this information, the Committee was not persuaded that the employee was unable to perform some type of work as of April 1, 1998. (HM 018)

ANALYSIS

The Court reviews the denial of benefits under an abuse of discretion standard when the plan gives the administrator "discretionary authority to determine eligibility benefits or to construe terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115(1989). In this case, the Plan provides the Administrative Committee, which is the Plan Administrator, the requisite discretion for the Court to use the abuse of discretion standard.[8] Under the abuse of discretion standard, the Court considers only the evidence that was before the plan administrator when the claim was denied. Laves v. Mead Corp. 132 F.3d 1246, 1251 (8th Cr. 1998). The administrator's decision will be affirmed if a reasonable person could have reached a similar decision. In evaluating reasonableness, the Court determines whether the decision is supported by substantial evidence Substantial evidence is more than *a* scintilla, but less than a preponderance. Sahulka v. Lucent Tecnologies, Inc. 206 F.3d 763, *767* 68 (8th Cit. 2000).[9]

The Court must conclude, after a review of the record, that the administrator's decision is not supported by substantial evidence. Plaintiff has been subjected to numerous evaluations, including several independent medical evaluations and psychiatric evaluations by several different mental health professionals. The results of the evaluations by the non-treating physicians arc in conflict. The only consistent evidence throughout has been that offered by plaintiff's treating physicians, Dr. Chakales and Dr. Remmel, who have steadfastly maintained that plaintiff is unable to work. That the Plan disregarded the overwhelming evidence by those physicians who are most knowledgeable of plaintiff s medical and psychiatric conditions is not reasonable. Donaho v FMC Corp. 74 F. 3d 894, 901 (8th Cir. 1996) (reviewing physician's opinion generally accorded less deference than that pf treating physician).

Furthermore, the evidence in the administrative record, on which the Plan relies, does not support the Plan's conclusion that plaintiff is not entitled to LTD benefits. One of the problems wit the evaluations that were performed is that they are isolated as to the particular specialty with which the evaluator was involved. Thus, the evaluators did not take into account all the problems, both physical and psychological, that plaintiff suffered. Furthermore, even those independent evaluators who recommended that plaintiff could do work did not recommend so unconditionally and unequivocally. Physicians who recommended that plaintiff had the physical capacity to perform work noted that plaintiff's depression, pain and medication might limit his ability.

The Health South evaluation is of limited value. Plaintiff was unable to complete it. No attention was given to plaintiff's medications or his depression. Additionally, Dr. Moore, a neurosurgeon, found the Health South evaluation to be erroneous in that it described a pseudoarthritis which

plaintiff does not have (HM *351)*

Likewise, the vocational assessment performed by Gay Signoff is of limited value. Plaintiff informed her that he did not feel he was able to work Signoff then proceeded to discuss possible jobs if plaintiff were to return to work in some capacity. The discussion amounts to "brainstorming," and "fantasizing" and hardly qualifies as a statement that plaintiff is able to work at a home-based job. Indeed, even Signoff notes that a list of possible jobs should be submitted for consideration by plaintiff and the workers compensation judge for determination as to whether such work is even feasible (HM 397).[10]

Reliance on Dr. Russell's recommendation is unreasonable. That Dr Russell relies on Christopher Reeves' "employment" as a basis for finding that plaintiff is capable of working is ludicrous.[11] First, Dr. Russell has no first hand knowledge of how much Reeves is actually working. Second, Reeves is in a unique situation as a well-known actor in that any "work" Reeves does would undoubtedly be done under exceptional circumstances. Third, if Reeves is the standard by which Dr. Russell determines disability then virtually no one would be found to be disabled. Not only does Dr. Russell's a comparison with Reeves diminish the value of his opinion, he, like others, failed to take into account plaintiffs medication, extent of pair, bad psychological problems.

Similarly, Dr. Pruitt's opinion cannot be used to justify a finding that plaintiff is capable of performing any work for compensation or profit While Dr. Pruitt agreed with Dr. Chakales that plaintiff is incapable of performing significant physical labor, he disagreed with Dr. Chakales' assessment that plaintiff could not perform any work at all. "[T]here are very few patients who are lot capable for performing at least some productive function in society within their physical limitations." (EM 346 Under this

standard, like the Christopher Reeves standard," essentially no one would be found to be entitled to LTD benefits, as most individuals could engage in some work activity no matter how minimal. Additionally, Dr. Pruitt notes plaintiffs chronic pain cannot be independently separated from his back injury. (HM 144).

The Plan also relied on a statement made by the workers' compensation attorney for Delta Air Lines that plaintiff testified in his deposition that he would be willing to return to work provided that he did not have to lift, bend, walk or stand for extended periods (HM 107, *245).* Use of statement is unreasonable, as it is uncertain whether the statement was even made; and if so, in what context it was made. Nowhere is the deposition testimony contained in the record.

In sum, the Court finds that the Administrative Committee's denial of disability benefits is unreasonable Defendant, therefore, is directed to provide plaintiff benefits under the Plan as of the date those benefits were terminated.

Also, pending before the Court is defendant's motion to compel. Because the Court has limited its review to the administrative record, and because the Court has found plaintiff to be entitled to benefits, the Court finds that many of the requests in the motion to compel have been rendered moot or are irrelevant Thus, the motion to compel is denied.

Accordingly, defendant's motion for summary judgment is denied; defendant's motion to compel is denied. Judgment will be entered in favor of plaintiff.

IT IS SO ORDERED this 6th day of September, 2000.

UNITED STATES DISTRICT JUDGE

Footnotes

[1]The Plan is set forth in Document Nos. DP001-DP013 (See Joint Stipulation of Undisputed for Trial, docket entry 30).

[2]According to Section 12.01 of the Plan:

> The operation and admInistration of the Plan. . ., the exclusive power to interpret it, and the responsibility for carrying to its provisions axe vested in the Administrative Committee of at least three members, which Committee shall be the Administrator of the Plan. . . The Administrative Committee shall establish rules for administration of the Plan and transaction of its business. The Administration Committee shall be named fiduciary of the Plan for purposes of operation and administration of the Plan (DP 053)

[3]The complete administrative record is set forth in documents produced by the Plan, Document Nos. HM001-HM526 (See Joint Stipulation of Undisputed Facts for Trial, docket entry 30).

[4]Additionally, plaintiff began receiving Social Security disability insurance benefits beginning 1992 (HM 066)

[5]It appears that defendant did not rely on the reports of Dr. Wilson and Dr. Peeples in making its December 29, 1993, determination that plaintiff was eligible for continuation of LTD benefits.

[6]The letter to plaintiff stated:

> Based on the Independent Psychiatric Evaluation performed by Dr. Bradley Diner,

> M.D. [sic] (Psychiatrist), who stated, "there is nothing from a psychiatric standpoint which should prevent Mr. Marshall from working." (sic] There was also a Functional Capacity Evaluation performed by Barbara Morris, M. S. physical Therapist), which also stated that you could work a sedentary type position. Then there was a [sic] Independent Medical Evaluation performed by Dr. Blankenship, M.D. [sic] (Orthopedic Surgeon), in which it was also reported that you could perform a clerical or sedentary type position. There was also a surveillance report provided by Norred and Associates which states that you were observed walking without 4 cane, and driving a car.

Consequently, effective 04/01/93 you do not qualify for Long Term Disability benefits..."
(HM 263)

[7]Dr. Remmel wrote another letter on May 15, 1998, to the attorney representing Delta Air Lines on plaintiffs workers compensation claim (HM 331). Dr. Remmel berated Delta Airlines for "harassing" plaintiff He also stated that he would advise plaintiff against participating in vocational rehabilitation "It is my medical opinion that Mr. Marshall is totally and permanently disabled. Any efforts to return to the work place will most likely meet with failure and a severe deterioration in both his mental and his physical condition."

[8]See Paramore v Delta Air Lines, Inc., 129 F, 3d 1446, 1450-51 (11th Cr. 1993) where arbitrary and capricious standard (akin to abuse of discretion) was applied to claims under similar plan.

[9]By Order dated August 24, 2000, the Court informed the parties that it would decide the case on the written record that had been submitted.

[10]In her report Signoff states: "[S]ome of [plaintiff's] physicians have indicated in recent reports that returning to the work force does not seem advisable. However, Dr. Pruitt and Dr. Russell do indicate that sedentary work is an option, and Dr. Russell appears to approve of the idea of home based work. I feel it would be appropriate to compile a list of occupations appropriate under the guidelines we have been given by Dr. Pruitt, Dr. Russell and HealthSouth and submit these for consideration and/or court for a determination on the feasibility of these. based upon the weigh that the claimant or judge will give to the various doctors reports." (HM 397) (emphasis added)

[11]In an August 27, 1998, file note in response to a request that he review Dr. Russell's report, Dr. Moore stated:". . I am amazed at the comparisons Dr. Russell is trying to make from the highest cervical injury of Christopher Reeves. Certainly, Mr Reeves is doing some activities of work but, significantly and terribly modified, to allow him to do this and be little more than a talking head. I am sure that his notoriety and status in this respect would have some influence on his hire ability." (HM 422).